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Telemarketing and Arizona's telephone solicitation laws

by Edwin J. Ricketts

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New legislation due to go into effect August 9 makes changes in Arizona's telephone solicitation laws. SB 1254 (Chapter Law 266) makes a number of changes about which those who engage in real estate related telemarketing may wish to familiarize themselves. Because authority was created in 1997 to use unlicensed persons to conduct limited telemarketing in real estate, telephone solicitation has increased in importance for the real estate industry in general.

Arizona Telephone Solicitations Act
In 1999 telephone solicitations made to Arizona residents were subjected to statutory regulation, including prohibiting solicitors from using: caller ID blocking devices; artificial or prerecorded messages; and unsolicited calls to mobile phones and pagers.¹ Further, telephone solicitors are required to maintain a "no-call" list of consumers who have previously stated a desire to not receive calls.

The law also establishes two registrations levels:² full and limited. The full registration is an annual filing required of most solicitors who try to get a consumer to commit to payment for goods or services during the phone call. Registration costs \$500 annually and requires a \$100,000 surety bond. Limited registration is free and is good for as long as the filing information remains correct. Failure to comply with the full registration is a class 5 felony. Failure to comply with the limited registration requirements, after notice by the Secretary of State, is a class 3 misdemeanor and subjects a solicitor to a \$25 late penalty.

There are certain exemptions³ that determine whether the full or limited

registration is required of a telephone solicitor. For instance, "a person acting within the scope of a license issued under title...32" is subject to the limited registration requirements. This appears to include the traditional telemarketing activities of time-share operators and the more recent blossoming broker-initiated telesolicitation. The registration applies whether the telemarketing is done through others or conducted by the licensees themselves.

The key to application of the telephone solicitation act to real estate is found in the definition of "seller." This term was significantly expanded in scope by SB 1254 because the former definition failed to include some telemarketing activities. The new definition

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Reading a book during CE class results in license suspension

The Department has summarily suspended the license of a self-employed Scottsdale real estate broker who allegedly falsified continuing education credits on his license renewal application.

On May 31, 2001 Frank A. Amato signed a declaration that he had attended and received credit for a May 29 Broker Management Clinic. The instructor of the clinic, however, reported to the Department that Amato read a book during the three-hour course. "From the outset, Mr. Amato paid no discernible attention to me, as the instructor, or to the class material. He never participated. I do not recall that he even looked up from time to time. He was engrossed in what appeared to be a thick novel," the instructor told the Department.

At the end of the course, the in-

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Department seeks Volunteer Monitors

The Department is seeking real estate licensees to become Volunteer Monitors who will attend prelicensure and continuing education courses, at no cost, presented in real estate schools in their geographic area, or distance learning (interactive computer-based, online or audio) training courses.

Volunteer Monitors then submit reports about the courses to the Department regarding course presentation, content and other important course elements.

"We wish to broaden our Volunteer Monitor Program and are seeking licensees in the residential, commercial, business and other speciality fields from all parts of Arizona," said Cindy Wilkinson, the Department's Education & Policy Officer.

Although Volunteer Monitors perform a valuable service for the Department, they receive no payment for their services. They do receive continuing education credit for all CE classes and some prelicensure classes.

To be considered for participation in the program you must have an active or inactive real estate license and you must be willing to audit a minimum of one course approximately every two months.

Interested? Send a resume or letter to the address below stating your real estate background, what you think you might gain by becoming a course monitor, your thoughts about current continuing education courses in Arizona, and your willingness to observe at least one course approximately every two months.

Please address your correspondence to: Cindy Wilkinson, Education & Policy Officer, ADRE, 2910 N 44th Street, Suite 100, Phoenix AZ 85018.

Visit the Department's
web site at
www.re.state.az.us

Exposure to dangerous mold is very difficult to diagnose

No reliable tests are available, and some tests in use can produce false positive results

by Norm Peterson

Got mold? The answer is an unequivocal “yes” for most people, considering mold is everywhere—in the air, in the soil, and on many surfaces both indoors and out. But when is mold exposure a cause for health concerns, and how can physicians determine whether a patient is at risk?

Recently, national tabloid news media have raised the public’s concern about health problems from exposure to indoor molds. Although not supported by the Centers for Disease Control and Prevention, there have been recurring “news” stories that suggest a link between the fungus, *Stachybotrys chartarum* (*S. chartarum*), and pulmonary hemorrhage cases in Ohio. Consequently, public anxiety about possible toxic fungal exposure in homes, schools and workplaces has increased. Actual case reports of pulmonary hemorrhages are rare and limited, and a causal link between the presence of the toxic mold and this condition has not been proven.

The hazards presented by molds that may contain mycotoxins should be considered the same as other common molds which can grow indoors. For many persons, exposures to common molds will result in no adverse health effects. More sensitive persons may experience hay fever-like allergic symptoms. Persons with asthma appear to be the most sensitive population.

Nevertheless, as a result of extensive media coverage, some patients may ask their physicians’ help to determine if they have been exposed to toxic indoor fungi.

There are no valid biomarkers for the toxins potentially produced by *S. chartarum*. Some physicians have used serum antibodies to *S. chartarum* antigens as an indicator of exposure and/or disease. Clinicians must recognize that most currently available commercial fungal immunological procedures have questionable specificity due to lack of purified or standardized fungal allergen extracts. The United States Food and Drug Administration has not evaluated or approved any testing method

for antibodies to *S. chartarum*.

Commercially available *S. chartarum* antigen cross-reacts with antibodies to *Aspergillus fumigatus* and *Alternaria alternata*, two common outdoor fungi. A positive *S. chartarum* test result does not necessarily mean the patient has developed antibodies to *S. chartarum*. The patient may have been exposed to an entirely different fungus that shares certain immunologic characteristics with *S. chartarum*.

Demonstration of mold-specific antibodies is insufficient to prove that health effects reported by individuals in moisture-damaged buildings are caused by mold exposure. There are currently no validated biomarkers of exposure to specific indoor fungi or their toxins. *S. chartarum* serology tests have no clinical application at this time. They cannot be used to imply the presence of *S. chartarum* within a home or workplace environment, nor can they be used to prove patient exposure to this specific mold or its toxins.

A common-sense approach should be used for any mold contamination existing inside buildings and homes. The Arizona Department of Health Services does not recommend environmental sampling as a first step to determine if a person has a household mold problem. Reliable sampling for mold can be expensive, and there are no standards for evaluating what level of exposure to mold is a problem. People who are concerned that their health problems are from exposure to molds can be instructed to take this common-sense approach for preventing and eliminating mold contamination existing inside a home:

- Eliminate household water leaks;
- Remove sheet rock, carpets and padding that have been flooded in the past;
- Remove carpeting in bathrooms;
- Clean bathrooms with common household cleaning products;
- Keep humidity levels in the house below 50 percent.

Norm Peterson is the State Epidemiologist and can be reached at 602-230-5876 or npeters@hs.state.az.us.

Barriers, highways, non-contiguous lands and common promotional plans

Potential Pitfalls in Walking Around the Arizona Subdivided Lands Act

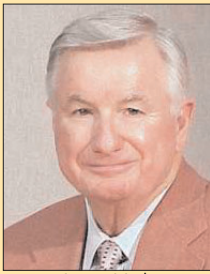
by Michael T. Denious

I. Introduction

The Arizona Subdivided Lands Act, A.R.S. § 32-2181 *et seq.* (hereinafter “the Act”) regulates offerings of subdivided land, which is land or lands divided or proposed to be divided for sale or lease into six or more lots or parcels, any one of which is smaller than thirty-six acres. Real estate agents and land developers are commonly aware of the general “five-split” rule under the Act: One may divide a parcel of land for purpose of sale or lease into as many as five lots in unincorporated areas¹ and remain exempt. [A five-split within incorporated areas is also exempt but may require satisfaction of a city’s or town’s subdivision requirement. *Ed.*] Where one divides or proposes to divide a parcel for purpose of sale or lease into six or more lots², any one of which is smaller than thirty-six acres, one must obtain a subdivision public report³ from the Arizona Department of Real Estate, and record a subdivision plat⁴ approved by the city or county in which the subdivision is located, among other requirements⁵. Platting requirements may entail significant expenses, because city or county approval of a subdivision plat will be conditioned on the subdivider making various improvements to the subdivision, including roads, utilities, water, sewage, and flood control. See A.R.S. §§ 9-463.01 & 11-806.01.

Along with the “five-split” rule, real estate agents and developers are also generally aware of a caveat: the “barrier” exception. A barrier, such as a river, or a highway permits land situated on either side of the barrier to be treated as completely separate and distinct areas for purposes of subdivision statutes, just as if the land were two noncontiguous parcels. Thus, under proper circumstances, one may sell off a parcel intersected by a barrier in excess of five lots without creating a subdivision, so long as no more than five lots are created on each side of the barrier. The

Continued on page 10



Jerry Holt

News From The Commissioner

The Auditor General's Sunset Review

The Auditor General's office has completed its Performance Audit of the Department, and has recommended some changes in the way in which we run the Department. We agree that some of the recommendations will better serve licensees and the public. Here's how some things will change:

- The Department has revised its complaint form (INV-800) to make it clear that the Department has no jurisdiction over complaints involving deposits and refunds, contracts or listing disputes, and ethical or performance issues unless the complaint involves fraud, misrepresentation or negligence. The form has been redesigned to make it clearer that the Department has no jurisdiction over service and warranty disputes, homeowners association issues, unpaid bills, commission disputes, and landlord and tenant matters.
- The Department will change the way in which it tracks and reports on the number of complaints it receives, and the disposition of those complaints.
- In determining penalties to be imposed as the result of an administrative hearing, the Department will continue to consider previous violations and other aggravating or mitigating circumstances that might influence the penalty to be imposed.
- The Department will consider proposing legislation which would transfer authority for approving Recovery Fund claims from the courts to the Real Estate Commissioner.
- The Department will make available

over the telephone, by mail and by email, a summary of the nature and number of closed and dismissed investigative files, pending hearings and pending disciplinary actions. However, in keeping with past policy, information about open investigations and pending complaints will not be disclosed.

- It is no longer necessary to submit a written request in advance, nor photo identification, to view licensees' files.
- License files prepared for consumer viewing will contain the licensee's complete complaint and disciplinary history.
- Licensee's files will contain a summary of the public record portions of closed investigative files and formal disciplinary actions.

The bottom line is that the Auditor General will recommend to the Arizona Legislature that the Arizona Department of Real Estate should stay in business for at least another 10 years, and that's good (I think).

Keeping the Education in Continuing Education

In a life before I became Arizona's Real Estate Commissioner, I attended a three-day continuing education course in which two licensees whiled away the hours playing chess in the back of the classroom. The instructor paid no attention to them.

I have always regarded this experience as a foundation for not only constantly striving to improve the quality of continuing education during my tenure, but also to monitor classes to ensure student attention.

In the story that begins on page 1, "Reading a book during CE class leads to

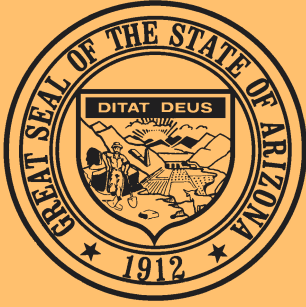
license suspension," we have a licensee who believed that merely showing up for a CE course—in this case a Broker Management Clinic—regardless of whether he paid any attention to what was going on was enough to earn three hours credit for the course.

The instructor refused to issue a continuing education certificate in spite of the student's protests. To make matters worse, the licensee falsified his license renewal application by attesting that he had evidence of completing the continuing education hours required for renewal.

His license was summarily suspended. As of this writing (after 15 days suspension) he has retaken the class, paid enough attention to get a certificate (evidence) of attendance, resubmitted the certificate and requested reactivation of his license.

As I said in the article, I stand firmly behind any instructor who refuses to issue a continuing education certificate under circumstances like these. The student in this case was a real estate broker who was attending a mandatory class designed to keep him out of trouble. The class was taught by an instructor who probably knows more about a broker's management responsibilities than anyone other than the Department's auditors. It is most unfortunate that the student decided he didn't need to know anything about managing his books, his records, his trust accounts, or his employees.

The most important goals of continuing education are to enable you to serve your clients in the fairest and most efficient way possible, and to keep you out of trouble. Twenty-four hours of your undivided attention every 17,520 hours (two years) is not an unreasonable requirement. On the contrary, it is essential. Go Sir, and sin no more.



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Painless License Renewal

Renewing your real estate license in person at our Phoenix office can take but a few minutes, however waiting until the last week -- or worse yet, the last day -- before your license expires may extend the process significantly.

In the first three weeks of June, an average of 100 customers visited our licensing front counter each day. During the last week in June, the daily average jumped to 168, and peaked at 255 visitors on June 29.

Here are some tips that can save your valuable time when renewing your license.

1. Renewing by mail is simple and quick. License renewal applications are mailed to your employing broker 90 days before your license expires. Complete the form as soon as you receive it,

- Attach a list of the continuing education courses you've taken (see Instruction 2 on the form);
- Sign the form and have your designated broker sign the form;
- Enclose your check;
- Mail everything back to the Department.

Your renewal will be effective on the date your license expires. Your new license will be mailed to your broker.

2. If you don't receive a renewal form in the mail, you may download the form, LI-243, from our web site at www.re.state.az.us/library.html.

3. Your employing broker must sign your renewal application unless your license is on "inactive" status.

4. If you renew in person, you'll save time by completing your renewal application before you visit the Department.

5. Fill out the list of continuing education courses you have taken in advance (See Instruction 2 on the form). Note that you need 24 hours of continuing education with a minimum of three hours in each of these categories:

- Agency Law
- Contract Law
- Commissioner's Standards
- Real Estate Legal Issues
- Fair Housing

4. Avoid renewing your license in person during the last week of the month, and especially on the last two days of the month. This could save you a wait of 30 to 45 minutes.

5. If the last calendar day of a month falls on Saturday or Sunday, you may submit your renewal on the following Monday without penalty. If that Monday is a holiday, you may renew on Tuesday without penalty.

6. If you are a designated or self-employed broker, you must have attended a Broker Management Clinic during the two years prior to license expiration to renew your license.

**The mission of the
Arizona Department of Real Estate
is to safeguard and promote the public interest
through timely and capable assistance,
fair and balanced regulation,
and sound and effective education.**

ADMINISTRATIVE ACTIONS

SUMMARY SUSPENSIONS

01A-066

**W. Darlene Long
Bullhead City**

DATE OF ORDER: June 21, 2001

FINDINGS OF FACT: Respondent was issued a real estate broker's license in October 1984. She is self-employed and doing business as E.C.I. Realty.

After receiving complaints about Respondent, the Department attempted to conduct an investigative audit of Respondent's trust account in May 2001. The auditors were unable to complete the audit due to poor record keeping. Respondent advised the auditors that she could not find trust account bank records requested by the Department.

By Respondent's own admission her property management trust account is at a deficit of approximately \$35,000 (Perhaps much more. Ed.); she has not performed bank reconciliations for approximately two years; and has unopened mail going back to 1999.

On May 16, 2001, the Ethics Hearing Panel of the Professional Standards Committee, Bullhead City/Mohave Valley Associations of Realtors, found Respondent in violation of Articles 1 and 8 of the Code of Ethics and recommended Long be fined \$2,500, placed on one year probation and attend a Broker Management Clinic within 90 days.

VIOLATIONS: Respondent disregarded or violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20 and Commissioner's Rules in violation of A.R.S. § 32-2153(A).

Respondent failed, within a reasonable time, to account for or to remit any monies, to surrender to the rightful owner any documents or other valuable property coming into her possession which belonged to others in violation of A.R.S. § 32-2153(A)(9).

She failed to keep an escrow or trust account or other record of funds deposited with her relating to a real estate transaction in violation of A.R.S. § 32-2153(A)(15).

Respondent commingled the money or other property of her client with her own or converted that money or property to herself or another in violation of A.R.S. § 32-2153(A)(16).

She failed to produce any document, book or record in her possession concerning any real estate transaction upon demand for inspection by the Department in violation of A.R.S. § 32-2153(A)(17).

She failed to maintain a complete record of each transaction which came within the provisions of this chapter in violation of A.R.S. § 32-2153(A)(18).

She failed as a licensed broker to exercise reasonable supervision over the activities of salespersons, associate brokers or others in her employ or failed to exercise reasonable supervision and control over the activities for which a license is required of a corporation, limited liability company or partnership on behalf of which she acted as designated broker under A.R.S. § 32-2125 in violation of A.R.S. § 32-2153(A)(21).

She demonstrated negligence in perform-

ing acts for which a license is required in violation of A.R.S. § 32-2153(A)(22).

She failed to write property management agreements in clear, unambiguous language in violation of A.R.S. § 32-2173(A).

She failed to provide, immediately on termination of a property management agreement, all originals or other copies of all rental agreements or related documents in her possession for current and previous tenants, and failed to provide the owner with a final account of the property's financial status as required by A.R.S. § 32-2173 (B) and (C).

She failed to maintain owners' monies in a property management trust account in violation of A.R.S. § 32-2173.

She failed to maintain property management records in accordance with the requirements of A.R.S. § 32-2175.

She failed to make available to the Commissioner's representatives, for routine audit purposes, within a reasonable amount of time, all records relative to property management accounts including lease agreements, lease related documents and trust account records, as required by A.R.S. § 32-2175(H).

She breached her fiduciary duty to her clients to protect and promote the client's interest as required by A.A.C. R4-28-1101(A).

She failed to expeditiously perform all acts resulting from an agreement authorized by the holding of a license as required by A.A.C. R4-28-1101(C).

DISPOSITION: Finding that Respondent committed acts in violation of A.R.S. §§ 32-2153 and 2173, the public welfare or safety imperatively requires emergency action in this matter.

IT IS ORDERED that the real estate broker's license of W. Darlene Long is hereby summarily suspended.

01A-085

**Frank A. Amato
Scottsdale**

DATE OF ORDER: July 18, 2001

Respondent was originally granted a license in July 1986. He is a self-employed broker doing business under his own name.

The Department has investigated the allegation that Respondent did not complete one of the courses claimed on his renewal application, and has concluded that he did not complete the course and was not given the certificate of completion for the course.

By Respondent's own admission, he was not complying with the requirements of the course.

Respondent falsely claimed on his application for license renewal completion of a course for which he did not qualify nor receive credit, contrary to the applicable statutes and Commissioner's Rules, including A.R.S. §§ 32-2153(A)(3), 32-2130(A), 32-2135(B), and A.A.C. R4-28-402(A)(1).

DISPOSITION: Respondent's real estate broker's license is summarily suspended. Respondent may request an administrative hearing to contest this action by filing a Notice of

Appeal within 30 days of receipt of this notice.

Note: The order was vacated and the license suspension lifted on August 2 after Respondent provided evidence that he had completed the required course.

LICENSES DENIED

01A-006

**Thomas J. Hemsher
Phoenix**

DATE OF ORDER: June 14, 2001

FINDINGS OF FACT: In his January 2001 application for a real estate salespersons' license, Applicant disclosed a 1985 conviction in South Dakota for possession of marijuana, a class 2 misdemeanor. He also disclosed a May 1991 conviction for forgery, a class 4 felony, in Navajo County.

He disclosed that the Arizona Registrar of Contractors had suspended his contractor's license in December 2000. As a result of a complaint filed against him, he had been ordered to pay a \$300 civil penalty and post an additional \$1,000 bond. The license was suspended because he had not complied with an order to correct faulty workmanship in building cabinets and a fence.

In January 2001 he canceled his contractor's license without doing anything further to comply with the Registrar's order. When questioned about his obligation to the customers he harmed, he stated they could get money from his bonding company.

The Administrative Law Judge wrote that the applicant "clearly has a felony conviction that involves forgery. That causes some concern. But what is most troubling is Applicant's recent violation of the contracting statutes and his utter lack of responsibility for the damage that he caused."

DISPOSITION: License application denied.

01A-008

**William T. Helfrey
Higley**

DATE OF ORDER: June 14, 2001

FINDINGS OF FACT: In his January 2001 application for a real estate salesperson's license, Petitioner disclosed he had been convicted of theft, a class 1 misdemeanor, in June 1998.

At the administrative hearing, Petitioner called no character witnesses to testify that he has rehabilitated his character. He called no character witnesses to testify that he is now an honest and truthful person. He failed to submit any character reference letters regarding his character and professionalism. He failed to disclose any community service that would show that he is a person of honesty, truthfulness and good character.

DISPOSITION: License application denied.

01A-010

**Anthony W. Alsop
Phoenix**

DATE OF ORDER: June 27, 2001

Continued on page 6

Continued from page 5

FINDINGS OF FACT: In his December 2000 application for a real estate salesperson's license, Petitioner disclosed a 1988 felony conviction for grand larceny, a 1989 conviction for auto burglary, a 1992 conviction for unlawful use of a firearm and a 1995 conviction for writing a worthless check.

VIOLATIONS: The Administrative Law Judge wrote, "...insufficient time has elapsed as of this point from his earlier extended pattern of criminal behavior and dishonesty to show that Petitioner has been rehabilitated and become a person of good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: License application denied.

01A-099

**Erik John Benko
Fountain Hills**

DATE OF ORDER: July 12, 2001

FINDINGS OF FACT: Petitioner appealed the Department's denial of his application for a real estate salesperson's license and a hearing was set for May 24, 2001. Either Petitioner or someone acting on his behalf accepted delivery of the notice of hearing. Petitioner did not appear for the hearing nor did he advise the Office of Administrative Hearings of any reason that would establish good cause for his failure to appear.

DISPOSITION: License application denied.

01A-005

**Rob D. Brown
Phoenix**

DATE OF ORDER: July 12, 2001

FINDINGS OF FACT: In his November 2000 application for a real estate salesperson's license, Petitioner disclosed convictions in 1992 and 1999 for DUI.

At the administrative hearing, Petitioner testified that in his 1998 arrest, leading to the 1999 conviction, the arresting officer was a liar, that he was lazy and just trying to meet his arrest quota. He conceded that he pleaded guilty to the charge but testified that he lacked the funds to properly defend himself.

Petitioner tended to downplay the significance of his two DUI convictions in regard to the profession of a real estate agent. He argued that drinking is quite common in the real estate industry.

He testified that a chauffeur (who transports people for a living) should not have a DUI conviction. He argued that he is not applying for a chauffeur's license. He testified that he is only applying for a real estate salesperson's license and that as a real estate agent he does not expect to be transporting people around like a chauffeur.

The Administrative Law Judge wrote that he "finds that the Petitioner is dead wrong. The profession of a real estate agent requires countless hours of traveling and 'chauffeur' clients to view houses."

Petitioner further testified that he is not applying for an active real estate salesperson's license. He said he is simply trying to "increase my well-being for future potential." He testified that he does not want a provisional real estate

salesperson's license because he cannot afford the drug testing every two weeks.

DISPOSITION: License application denied.

01A-011

**Stephanie Gay Workman, aka Stephanie Goodman
Pinetop**

DATE OF ORDER: July 20, 2001

FINDINGS OF FACT: In her renewal application for a real estate salesperson's license, Petitioner disclosed a July 2000 conviction for DWI and two counts of endangerment. The DWI charge is a class 1 misdemeanor. The two endangerment charges were alleged to have been committed as acts of domestic violence, class 6 open-ended felonies.

All three charges stemmed from the same incident. In November 1999, a Show Low Police officer observed Petitioner's car without headlights at 10 p.m. When the officer stopped petitioner, he found the car had substantial damage to the front end. Petitioner's two children, a small child and baby, were in the car with her.

Shortly after making the stop, another vehicle pulled over. That vehicle had been hit by Petitioner approximately three-quarters of a mile back on the road. Petitioner had not stopped after the accident.

VIOLATIONS: The Administrative Law Judge wrote, "A.R.S. § 32-2130(E) leaves no discretion to the Department. A license may not be renewed while a person is on probation for a felony. Petitioner is, within the meaning of that statute, presently on probation for a felony.

DISPOSITION: License renewal denied.

PROVISIONAL LICENSES GRANTED

01A-025

**Margaret S. Olson
Glendale**

DATE OF ORDER: June 7, 2001

FINDINGS OF FACT: In her November 2000 application for a real estate salesperson's license, Petitioner disclosed several criminal convictions dating back to 1984.

In 1983, after renting a U-Haul truck, she failed to return it and kept it for three months. She was convicted in Ohio in 1984 of grand theft of a motor vehicle, a class 3 felony.

Also in Ohio in 1984 Petitioner was indicted on 10 counts of forgery for writing checks on an account that was not hers, and convicted of one count of forgery, a class 4 felony.

Her record also discloses arrests for shoplifting in 1983 and solicitation to commit prostitution in Phoenix in 1991. Whether these arrests resulted in convictions is not clear.

Applicant testified at the hearing that she committed the crimes during "a bad time in [her] life." She was taking drugs and needed money. In the early 1990s she "cleaned up." She studied to become a Physician's Assistant from 1992 to 1996. She has held several jobs for significant periods in which she had significant responsibilities. She does a good deal of community service work presently, talking to teens about the dangers of drug abuse. She testified that she has a great desire to sell real estate.

The Administrative Law Judge wrote, "Tak-

ing all of the evidence into account, the record fails to show that Petitioner should be precluded from licensure.

DISPOSITION: The Department shall issue Petitioner a two-year provisional real estate salesperson's license. During all periods of active licensure, up to two years' cumulative active licensure, Petitioner shall comply with the following terms and conditions:

1. Each designated broker who wishes to employ Petitioner shall file with the Department's Compliance Officer a signed statement certifying that the broker has received and read a copy of this order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Department's Compliance Officer which attest to Petitioner's workload as well as the quality of her services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules.

2. Petitioner shall post a surety bond in the amount of \$5,000.

01A-004

**Joshua D. Ronding
Chandler**

DATE OF ORDER: JULY 12, 2001

FINDINGS OF FACT: In his January 2001 application for a real estate salesperson's license, Petitioner disclosed a 1997 conviction, at the age of 19, for shoplifting, a class 1 misdemeanor.

Since before the time of the shoplifting incident, Petitioner has been employed by a restaurant. At the time of the incident he was a waiter. Approximately one and one-half years ago, Petitioner was given a merit promotion to the position of assistant manager. In this position, Petitioner carries many fiduciary duties, including completing the banking for the restaurant and some accounting of cash registers at the end of the shift he is managing. Petitioner has been employed in this position without incident. **DISPOSITION:** The Department shall issue Petitioner a two-year provisional real estate salesperson's license.

Each designated broker who wishes to employ Petitioner shall file with the Department's Compliance Officer a signed statement certifying that the broker has received and read a copy of this order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Department's Compliance Officer which attest to Petitioner's workload as well as the quality of her services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules.

CONSENT ORDERS

00A-138

**Deborah L. Roberts
Prescott**

DATE OF ORDER: April 30, 2001

FINDINGS OF FACT: In her October 2000 application for a real estate broker's license, Respondent disclosed that her Massachusetts real estate sales license had been suspended. She was employed in Massachusetts by her husband, a licensed real estate broker, and had made her a signator on all his accounts. While

preparing for surgery he gave her specific instructions to sign a check returning a deposit to a buyer. On behalf of her husband she also signed an Offer to Purchase Real Estate, Receipt for Deposit, Exclusive Listing Agreement and Agreement for Exclusive Right to Sell, performing acts for which a broker's license was required.

VIOLATIONS: Respondent engaged in the business of real estate broker in Massachusetts without holding a license, in violation of A.R.S. § 32-2153(B)(8). She violated Massachusetts state laws and regulations that relate to real estate, in violation of A.R.S. § 32-2153(B)(10).

DISPOSITION: Respondent to be granted a two-year provisional real estate license and shall comply with the following terms and conditions during all periods of active and inactive status:

- Respondent shall work under the supervision of a designated broker as an associate broker.
- Within 10 days of employing Respondent, each employing broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Consent Order and agrees to act as Respondent's practice monitor. The practice monitor shall submit bimonthly written reports to the Compliance Officer which attest to Respondent's work load, as well as the quality of her services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules, or any precepts or standards as prescribed by the National Association of Realtors' Code of Ethics.
- Respondent shall not act as a self-employed broker or in a supervisory capacity, including acting as branch office manager or as a temporary designated broker pursuant to A.R.S. §§ 32-2127 or 32-2183.

If, within 60 days from the date of this Order, Roberts does not enter into, complete and obtain full ratification of a consent agreement with the Massachusetts Board of Registration of Real Estate Brokers and Salesmen regarding the above described violations, the Commissioner may summarily suspend the license granted herein.

If at any time the Massachusetts Board of Registration of Real Estate Brokers and Salesmen suspends or revokes Respondent's Massachusetts real estate salesperson's license, the Commissioner may utilize the results of those actions as grounds for suspension or revocation of her Arizona broker's license.

01A-012

Janice Kay Childress
Phoenix

DATE OF ORDER: May 23, 2001

FINDINGS OF FACT: In her January 2001 application for a real estate salesperson's license, Petitioner disclosed a 1997 misdemeanor conviction for possession of cocaine. The Court placed Petitioner on supervised probation for three years, participation in a substance abuse program which included drug testing at the direction of the probation officer.

In December 1999 the Court entered an Order granting early termination of Petitioner's probation based upon her successful completion of the substance abuse program and conditions

of probation.

VIOLATIONS: Petitioner's actions do not demonstrate good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license effective upon entry of this Consent Order. She shall comply with the following terms and conditions during all periods of active and inactive status:

- She shall abstain completely from the use of any alcohol, illegal drugs or controlled substances unless taken pursuant to a valid prescription and orders of a medical doctor.
- She shall submit to body fluid tests or breath tests, randomly drawn, not exceeding two per month at the request of the Department's Compliance Officer.
- Within 10 days of employing Petitioner, each employing broker shall file with the Compliance Officer a signed statement certifying that the broker has received a copy of this Consent Order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit bi-monthly written reports to the Compliance Officer attesting to Petitioner's workload, the quality of her services and client relationships. The practice monitor shall report any behavior or conduct which violates real estate statutes or rules, or any precepts or standards as prescribed by the National Association of Realtors' Code of Ethics.

00A-118

Peter Canacakos
Tucson

DATE OF ORDER: June 12, 2001

FINDINGS OF FACT: In August 1980 Respondent was issued a real estate salesperson's license That license will expire October 31, 2002.

Respondent took a listing from Arturo Heuser, the owner, on a house located in Tucson. On March 1, 2000, Scott Smith made an offer to purchase the house through Gary Roberts of Long Realty. Roberts provided Respondent with the offer, whereupon Respondent requested time to present the offer to the owner because the owner was in jail. Respondent did not visit with Heuser at the jail, but knew and permitted Hauser's fiancé to take the documents to him for signature. Respondent states he did so at the direction of Heuser.

The documents appeared to Respondent to be signed by Heuser, but after some time, on June 29, 2000, he learned that Heuser had refused to complete the sale. Heuser allegedly later claimed he had not signed the document.

Respondent stated that he had permitted Heuser's fiancé to sign a repair addendum after Heuser told him he had given her a power of attorney, but Respondent did not verify that the power of attorney existed. Respondent also stated the repairs sought were never performed by Heuser.

VIOLATIONS: Respondent failed to expeditiously perform all acts resulting from the listing in violation of A.R.S. § 32-2153(A)(3) and A.A.C. R4-28-1101(C).

DISPOSITION: Respondent to pay a civil penalty in the amount of \$1,500 and to attend 12 hours of approved continuing education classes in the categories of Contract Law, Legal Issues

including signing of documents, and Commissioner's Standards.

01A-031

Robert C. Beck
Glendale

DATE OF ORDER: June 25, 2001

FINDINGS OF FACT: Petitioner's real estate broker's license was revoked by the Department in 1991 after Petitioner admitted commingling or conversion of trust account funds. Petitioner was ordered not to reapply for a license for five years.

All sums were repaid to the trust account by Petitioner and he fully cooperated with the Department in its investigation.

The Department has received four character reference letters and has reason to believe that Petitioner has rehabilitated himself.

DISPOSITION: The Department shall issue Petitioner a two-year provisional salesperson's license based on the following terms:

- Petitioner shall post a surety bond in the amount of \$20,000.
- Within 10 days of employing Petitioner, each employing broker shall file with the Department's Compliance Officer a signed statement certifying that the broker has received and read a copy of this order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Department's Compliance Officer which attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules, or any precepts or standards as prescribed by the National Association of Realtors' Code of Ethics.

01A-053

Dustin L. Yates
Scottsdale

DATE OF ORDER: June 26, 2001

FINDINGS OF FACT: In his April 2001 application for a real estate salesperson's license, Petitioner disclosed a 2000 conviction for possession of marijuana.

Petitioner was placed on 36 months' probation and fined \$750. He was also to complete 24 hours of community service work.

Petitioner complied with all conditions of summary probation and on April 16, 2001, the Court granted early termination of probation.

DISPOSITION: The Department shall issue Petitioner a two-year provisional real estate salesperson's license. Petitioner shall comply with the following terms and conditions during all periods of active and inactive licensure:

- Petitioner shall abstain completely from the use of any and all illegal drugs or controlled substances unless taken under a valid prescription and orders of a medical doctor.
- Petitioner shall submit to body fluid tests randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.
- Each designated broker who wishes to employ Petitioner shall file with the Department

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t's Compliance Officer a signed statement certifying that the broker has received and read a copy of this order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Department's Compliance Officer which attest to Petitioner's workload as well as the quality of her services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules.

01A-047

**Steven James Werner
Scottsdale**

DATE OF ORDER: June 28, 2001

FINDINGS OF FACT: In his application for a real estate salesperson's license, Petitioner disclosed an April 1999 conviction for possession/consumption of alcohol by a minor, and two 1999 convictions for disturbing the peace, drug paraphernalia and possession of less than one ounce of marijuana.

VIOLATIONS: Petitioner's actions which gave rise to the misdemeanor convictions do not demonstrate good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: Petitioner shall be issued a two-year provisional license. Petitioner shall comply with the following terms and conditions during all periods of active and inactive licensure:

a. Petitioner shall abstain completely from the use of any alcohol, illegal drugs or controlled substances unless taken pursuant to a valid prescription and orders of a medical doctor.

b. Petitioner shall submit to body fluid tests or breath tests, randomly drawn, not exceeding two per month at the request of the Department's Compliance Officer.

c. Each designated broker who wishes to employ Petitioner shall file with the Department's Compliance Officer a signed statement certifying that the broker has received and read a copy of this order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Department's Compliance Officer which attest to Petitioner's workload as well as the quality of her services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules, or any precepts or standards as prescribed by the National Association of Realtors' Code of Ethics.

00A-076

**Brown Family Communities, L.P.
Tempe**

DATE OF ORDER: June 28, 2001

FINDINGS OF FACT: Brown Family Communities, L.P. (Brown) is an Arizona limited partnership licensed as a real estate broker.

In August 1998 Brown was issued a subdivision public report for the Eagle Ridge subdivision near 67th Avenue and Jomax Road in Phoenix. On page 5 of the report, under a section titled "Hazards and Nuisances," Brown disclosed the existence of "a reactivated open gravel mine approximately one-third of a mile north of the property..."

As part of its due diligence prior to conducting sales, Brown retained an environmental engineering firm to conduct an environmental study, including an inspection within one-half mile of the perimeter of the Eagle Ridge subdivision, specifically looking for solid waste and solid waste facilities or other environmental hazards.

The environmental engineering firm provided Brown with a written report indicating that it had found no evidence of environmental hazards or solid waste facilities within one-half mile of the subdivision.

At a public hearing on August 16, 1999, held by the vice mayor of Phoenix regarding the gravel mine, representatives of Brown received notice that the nearby gravel mine was, pursuant to a special use permit issued by the City of Phoenix, being operated in part as a landfill for inert, non-solid waste materials.

Thereafter, Brown included a disclosure in a document titled "Disclosure and Disclaimer Statement Brown Family Communities Entrada at Eagle Ridge," that "insertion of inert material" could be used to fill up the gravel pit. Brown represents that it provided a copy of that document to all individuals who entered an agreement to purchase a lot in the Eagle Ridge Subdivision after August 20, 1999, and has produced for the Department's inspection copies of such documents bearing the signatures of those purchasers.

Brown did not obtain an amended public report to disclose the existence of the special use permit or the landfill. The Department has received no complaints against Brown by any individual or individuals who purchased lots or home in the Eagle Ridge subdivision subsequent to August 20, 1999. The special use permit restricts the use of the landfill to insertion of inert materials for the purpose of reclamation of mined areas, and does not allow deposit of solid waste. The Department has received no evidence that the existence of the special use permit or the land fill in its present condition poses a threat to the public health or welfare of residents in the Eagle Ridge subdivision.

VIOLATIONS: Brown failed to apply for an amendment to its public report in violation of A.R.S. § 32-2184(A).

Brown failed to apply for an amendment to its public report for the Eagle Ridge subdivision stating a description of the existing and proposed land uses in the vicinity of the subdivision that may affect lot owners, including a description of all current and proposed adjacent land uses, contrary to the requirements of A.A.C. R4-28-A1203(3), and by reference, A.R.S. § 32-2153(A)(3).

DISPOSITION: Brown to pay a civil penalty in the amount of \$10,000.

01A-044

**John Wright Hopkins
Tucson**

DATE OF ORDER: June 29, 2001

FINDINGS OF FACT: In his March 2001 application for a real estate salesperson's license, Petitioner disclosed a 2000 misdemeanor conviction for public nuisance.

VIOLATIONS: Petitioner's actions do not demon-

strate good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: The Department shall issue Petitioner a two-year provisional real estate salesperson's license.

Each designated broker who wishes to employ Petitioner shall file with the Department's Compliance Officer a signed statement certifying that the broker has received and read a copy of this order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Department's Compliance Officer which attest to Petitioner's workload as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules, or any precepts or standards as prescribed by the National Association of Realtors' Code of Ethics.

01A-051

**Christopher Daniel Flores
Prescott Valley**

DATE OF ORDER: July 9, 2001

FINDINGS OF FACT: In his March 2001 application for a real estate salesperson's license, Petitioner disclosed a 1996 conviction for possession of drug paraphernalia and a 1999 DUI conviction.

VIOLATIONS: Petitioner has not shown he is a person of honest, truthfulness and good character as required by A.R.S. § 32-2153(B)(7).

DISPOSITION: Petitioner shall be issued a two-year provisional real estate salesperson's license subject to the following terms and conditions:

a. Petitioner shall abstain completely from the use of any alcohol, illegal drugs or controlled substances unless taken under a valid prescription and orders of a medical doctor.

b. Petitioner shall submit to body fluid tests or breath tests, randomly drawn, not exceeding two per month at the request and election of the Department's Compliance Officer.

c. Within 10 days of employing Petitioner, each employing broker shall file with the Department's Compliance Officer a signed statement certifying that the broker has received and read a copy of this order and agrees to act as Petitioner's practice monitor. The practice monitor shall submit quarterly written reports to the Department's Compliance Officer which attest to Petitioner's workload as well as the quality of her services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules, or any precepts or standards as prescribed by the National Association of Realtors' Code of Ethics.

00A-130

**Jean M. Jajou
Phoenix**

DATE OF ORDER: JULY 11, 2001

FINDINGS OF FACT: Jajou is currently and was at all times material to this matter an active licensed as a real estate salesperson. Alex Mogo was at all time material to this matter actively licensed as a real estate salesperson employed by Edmund Gorny and The Profit Task Force, Inc.,

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Telephone solicitation

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reads, in part: "Seller" means a person who, directly or through a solicitor...initiates telephone calls to provide or arrange to provide goods or services to consumers in exchange for payment."⁴ Further, even if exempt altogether from registration requirements, the above enumerated prohibitions, plus the "no-call" list requirements, apply to any telemarketing activities.

Perhaps the most significant effect of SB 1254 was to apply time restrictions to telemarketing of Arizona residents that originates from within Arizona. The current FTC rules apply only to interstate calling. Previously, therefore, there were no time restrictions at all to calls from within Arizona. The new prohibition tracks the FTC rules which allow calls from 8 a.m. to 9 p.m. (local time at the called party's location), any day of the week.

Real Estate Telemarketing

In 1997 an exemption was added to the real estate licensing act that permits, within specified limits, licensees to conduct telemarketing through the use of unlicensed persons. The exemption⁶ reads:

"Natural persons who are in the employ of an employing broker and who perform telemarketing services that are limited to soliciting interest in engaging the services of a licensee or broker or gathering demographic information that will be used by a licensee or broker to solicit prospective buyers, sellers, lessees and lessors."

First, note the unlicensed telemarketers must be "in the employ of an employing broker." The use of the word "employ" does not imply employment as opposed to independent contractor status. This is not a reference to tax or labor law. This reference is to the com-

mon law relationship between a boss and worker. The language does, however, imply the "reasonable supervision and control" required by brokers over their subordinates. Whether the unlicensed telemarketer is paid by and/or reports to the individual licensee or to the broker, it is the employing broker who has liability for, and is charged with supervision over and control of, the unlicensed telemarketer.

The activities of the telemarketer are "limited to soliciting interest in engaging the services of a licensee or broker or gathering demographic information." Soliciting interest in the services of a real estate licensee may include identifying the person on whose behalf the calls are being made and setting appointments for the licensee to discuss listing or buying services. Demographic information includes, in its broader context, the statistical characteristics of human populations, in this case information used to target or market real estate services. This includes age, gender, income, home ownership, etc.

How may an unlicensed telemarketer be paid? Generally, compensation is limited to a periodic salary or hourly wage. If connected to sales or purchase, that would constitute "special compensation," compensation that is performance based. The Department of Real Estate has historically taken the position that such compensation links the activity to the actual real estate activity, and is therefore prohibited. However, timeshare telemarketers are frequently compensated based on their sales presentation appointments.

In summary

If you are involved in telemarketing activities, check with the Office of the Secretary of State to confirm any requirement to register. Check the web site at www.soaz.com first. Familiarize yourself with the Arizona telephone solicitation act, if telemarketing with-

in the state, and with the FTC telemarketing rules, as well, if involved in interstate telemarketing. Remember, if you are fined by the Secretary of State for late registration, you must report it to the Department within 10 days.⁷

As to employing unlicensed telemarketers, remember to report these employees to the broker, because it is the broker who is ultimately responsible for their activities. Telemarketing scripts are advertising, so the broker must review and approve them. Unlicensed persons are prone to wander from the scripts, so watch them closely. Finally, ~~do not pay them on a basis that connects their activities to specific deals.~~

¹ See the Secretary of State's web page at www.soaz.com for terrific user and consumer information on telephone solicitation, including registration forms, consumer advisories and the telemarketing statutes.

² The form for regular registration may be downloaded from the Secretary of State's web page, but must be filled out and returned. The limited registration may be completed online.

³ A.R.S. § 44-1273(B)

⁴ A.R.S. § 44-1271(10)

⁵ In the Senate version of the bill sent to the House, call time were limited to 8 a.m. to 5 p.m. Monday through Friday, and 10 a.m. to 4 p.m. Saturday (no calls on Sunday). As a *mea culpa*, I confess I mistakenly selected the House staff summary that contained these time restrictions and erroneously reported them at a recent meeting of Arizona School instructors as reflecting the content of the final bill.

⁶ A.R.S. § 32-2121(A)(10)

⁷ A.A.C. R4-28-301(F)

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dba Century 21 Solutions.

In April 1999, Norman and Betty Organ of Glendale, the buyers, contacted Jajou regarding their desire to purchase a mobile home in the Glendale area. During the next several months, buyers related to Jajou that they were pre-approved for financing through Colonial Mortgage for a purchase price in the range of \$55,000 to \$60,000. They told Jajou that they only wanted to look at 1980 or newer mobile homes.

Jajou contacted the Colonial Mortgage who stated they would finance a "double-wide" 1978

model or newer.

On September 30, 1999, Jajou searched the multiple listing service (MLS) listings for 1978 or newer model homes that met Colonial and the buyer's requirements. One of the properties was listed by Mogo at \$49,000 and was described as a 1992 model.

On September 30 or October 1, 1999, Jajou took the buyers to see the property. The buyers decided to make an offer, and Jajou prepared and presented to Mogo a purchase contract from the buyers offering \$45,000 for the property.

Although the buyers were pre-approved for financing, the financing offered by the seller was more attractive and the buyers decided to accept the seller's financing.

The seller, Capital Funding, of which Matthew Rogers is the president, is engaged in the business of real estate. Rogers is a licensed self-employed real estate broker.

Capital Funding required the buyers to provide a one-year hazard insurance policy and to

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Barriers

Continued from page 2

benefits of this scenario are obvious: where, ordinarily, a parcel may be divided and offered for sale by one seller (or group of cooperating sellers) into no more than five separate lots, a parcel intersected by a river, canyon, mountain or road (or any combination thereof) may legally be divided into multiples of five lots, depending on the number of barriers involved.

Reliance upon the "barrier" exception to carry out multiple five-splits has some significant pitfalls, however. First, sellers must consider whether a true "barrier" or "highway" exists within the meaning of the statute. Second, even where a parcel or parcels are separated by a barrier or road (or are physically non-contiguous), they will nevertheless constitute one subdivision where they are created or sold as part of a common promotional plan. The statutory provisions defining barriers, highways, non-contiguous lands and common promotional plans are discussed below.

II. Discussion

A. Barriers and Highways

Land sellers and their agents should take care in determining whether a barrier or public road exists so as to legally separate otherwise contiguous lands. The barrier rule has been subject to both judicial interpretation and legislative modification within the past five years.

The barrier rule was originally contained in the Commissioner's Rules under A.A.C. R4-28-29, which provided, "Land on two sides of a barrier, including but not limited to, a public highway, river, canyon, canal or lake will be considered two separate non-contiguous parcels when such parcels cannot be reunited and when the barrier was not caused or created by the present owner." *Id.* That rule was repealed in or around 1982.

Several years later, the barrier rule became part of A.R.S. § 32-2101(16).⁶ It is an exception to the definition of "contiguous," which states:

"Contiguous" means lots, parcels or fractional interest that share a common boundary or point. Lots, parcels or fractional interests are not contiguous if they are separated by either of the following:

- (a) A barrier.
- (b) A road, street or highway that

has been established by this state or by any agency or political subdivision of this state, that has been designated by the federal government as an interstate highway or that has been publicly maintained by this state or any agency or political subdivision of this state and has been used continuously by the public for at least the last five years. A.R.S. § 32-2101(16).

A "barrier" is explicitly defined under A.R.S. § 32-2101(5) as a "mountain, cliff, river, canyon, canal or lake that prevents parcels from being united or reunited and that was not caused or created by the owner of the parcels during the five years immediately preceding any sale or lease of the subject property." *Id.* This is consistent with former A.A.C. R4-28-29.

The statute is significantly broader than the former rule, however, in its application to roads, streets or highways. Under the former rule, only a "public highway" qualified, which applied only to roads or highways properly established by the state or governmental entity. To be "established," a road must be properly dedicated⁷ and accepted for maintenance (in most cases, by the county) pursuant to statutory requirements. *West v. Sundance Dev. Co.*, 169 Ariz. 579, 583, 244, 821 P.2d 240, 244 (App. 1991); see also *Siler v. Dept of Real Estate*, 193 Ariz. 374, 382, 972 P.2d 1010, 1018 (App. 1998), rev. denied (1999); *State ex rel. Herman v. Dardon*, 112 Ariz. 548, 550, 544 P.2d 657, 659 (1976); *City of Scottsdale v. Mocho*, 8 Ariz. App. 146, 444 P.2d 437 (1968). In *Siler*, the Arizona Court of Appeals rejected a defense by a subdivision that a dirt road over a right-of-way easement was a "highway" that caused land on each side to be legally non-contiguous. The court noted that the barrier rule had been repealed at the time of the transactions at issue, and further stated in dicta that the dirt road and the easement on which it was situated did not constitute a "permanent barrier that would prevent the land from being reunited as contemplated by that rule." *Id.* at 382-83, 972 P.2d at 1018-19.

In its present form, the statute includes not only roads or highways that have been "established" by the state or an agency or political subdivision thereof,⁸ but also includes any road that has been "publicly maintained" by the state, county or city and which has been continuously used by the public for the preceding five years. A.R.S. § 32-

2101(16).

For the state, county or city to publicly maintain a road or street that does not qualify as a public highway, the entity must have, at the very least, a right-of-way over the road, if not fee ownership. Further, the road or street must have been laid out, constructed and completed pursuant to an approved plat (if within a subdivision *Ed.*), and in accordance with "standard engineering specifications" adopted by the county. A.R.S. § 28-6705(A); see generally *West v. Sundance Dev. Co.*, 169 Ariz. 579, 583, 244, 821 P.2d 240, 244 (App. 1991). There is an exception for roads laid out, constructed and completed before June 13, 1975. A.R.S. § 28-6705(B). Counties may maintain such roads even where they do not comply with standard engineering specifications. *Id.* Counties may also designate such roads as "primitive roads" not subject to regular maintenance, but on which minor repairs and upkeep may be performed from time to time. See *id.*; A.R.S. § 28-6706.

B. The Relationship Between Barriers, Highways and Contiguity: The Common Promotional Plan

As noted above, barriers and highways are significant because they make lots that are physically contiguous, legally non-contiguous. This begs the question of why contiguity is important.

Contiguity is one important, but not necessary, factor in determining whether individual lots or parcels are part of one subdivision. A subdivision includes "lands divided or proposed to be divided as part of a common promotional plan." A.R.S. § 32-2101(54). A "common promotional plan" is generally defined as "a plan, undertaken by a person or group of persons acting in concert, to offer lots for sale or lease." A.R.S. § 32-2101(14).

A common promotional plan is presumed where:

1. The lots are contiguous;

OR

2. The lots are known, designated or advertised as a common unit or by a common name. See A.R.S. § 32-2101(14).

Thus, where lots are either contiguous, or, even if non-contiguous, are known or advertised as a common unit or under a common name, they are presumptively part of a common promotional plan, hence, one subdivi-

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sion. See *id.*; A.R.S. § 32-2101(54). This applies both to offerings by one individual or entity, and to offerings by a group of individuals or entities acting in concert. A.R.S. § 32-2101(14).

This does not equate to say that lands that are physically non-contiguous, or that are separated by a barrier or highway (and are thus legally non-contiguous) cannot be part of one subdivision pursuant to a common promotional plan. There is a perception common in the real estate industry, in the author's experience, that non-contiguous lands (whether separated by other land or a barrier or highway) cannot be considered together as part of one subdivision. Under this view, even where lots or parcels directly abut each other, and are owned by the same person⁹ or entity, the barrier or highway enables the owner to create as many as five splits on each side of the barrier or highway without creating a "subdivision."

Contrary to this notion, a common promotional plan will still be presumed where the lots have a common identity pursuant to A.R.S. § 32-2101(14), even if not contiguous. See *id.* As an example, six separate non-contiguous parcels of land would be part of one subdivision where they are known or advertised for sale under a common name (e.g., "Salt River Estates").

Moreover, a common promotional plan may still exist even where both contiguity and common identity are absent. See A.R.S. § 32-2101(14); *Siler v. Dep't of Real Estate*, 193, Ariz. 374, 380-81, 972 P.2d 1010, 1016-17 (App. 1998). In *Siler*, the court held that a common promotional plan existed where a group of individuals bought lands with a plan (inferred from surrounding facts) to divide them into more than four lots,¹⁰ even where those lands were not all contiguous. *Id.* at 380, 972 P.2d at 1016. The court noted that a common promotional plan required only a showing that, pursuant to A.R.S. § 32-210(14), there was a "plan" to divide and offer the lots for sale or lease. *Id.*

Thus, absent either of the presumptive factors, a common promotional plan may be established through a number of different factors. Such factors might include, in the author's opinion, any or a combination of the following:

- Cooperation by several different buyers in purchasing one large parcel from one seller, surveyed into separate lots

for each buyer, with each buyer carrying out their individual five-splits thereafter pursuant to a preconceived plan¹¹;

- Cooperation by neighboring sellers, each of whom split their parcels into no more than five lots, to record easements for access or utilities, CC&Rs, or to install wells, water or utility services;
- Cooperation by a seller with a buyer or multiple buyers who purchase with carry back terms secured by deeds of trust, with the seller agreeing to approve partial deed releases, eventually resulting in releases of six or more separate lots.¹²

By way of reference, the federal Interstate Land Sales Full Disclosure Act (ILSFDA) regulates subdivision¹³ offerings sold pursuant to a "common promotional plan" by an individual or group of individuals acting in concert. See 15 U.S.C. § 1701, *et seq.* ILSFDA's definition of a common promotional plan is similar to that under the Arizona Act. See 15 U.S.C. § 1701(4). Factors considered by HUD in determining whether a common promotional plan exists under ILSFDA may include a thread of common ownership, common sales agents, common sales facilities, common advertising, and/or common inventory.¹⁴ See 61 Fed. Reg. 13596, 13602 (1996); *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 731 (11th Cir. 1982) (citing 44 Fed. Reg. 24010, 24011 (1979)); *United States v. Dacus*, 634 F.2d 441, 444 (9th Cir. 1980); see also *De Luz Ranchos Inv., Ltd. v. Coldwell Banker & Co.*, 608 F.2d 1297, 1302 (9th Cir. 1979).

To summarize, the existence of a barrier or highway does not provide a green light to a developer to carry out multiple five-splits within each portion of a parcel intersected by a barrier, or highway, or other land. An individual or group that offers six or more lots pursuant to a common promotional plan is conducting a subdivision offering subject to the Subdivided Lands Act.

III. Conclusion

Would-be subdividers and their agents and legal counsel should be wary in construing the statutory provisions for barriers, highways and common promotional plans under the Arizona Subdivided Lands Act. A parcel of land divided by a legitimate barrier or highway may be treated as two separate, non-contiguous parcels, such that sales

of the respective parcels may be treated as separate offerings that are not subject to the subdivision statutes so long as each offering does not exceed five total lots. Nevertheless, the key consideration must be whether the offerings are part of one "common promotional plan," and if comprised of six or more lots combined, a subdivision. A common promotional plan will exist even where parcels are non-contiguous, if they share a common identity or are advertised under a common name. Further, even absent contiguity or common identity, a common promotional plan may exist based upon a number of combined factors. The existence of a barrier or highway, therefore, should not be considered to be an automatic "safe harbor" from complying with the subdivision statutes.

¹ Within the limits of any incorporated city or town, a subdivision for purposes of platting requirements consists of either; four or more lots; two or more lots where a new street is involved; or, three or more lots where the boundaries of the parcel being split are fixed on a recorded plat. See A.R.S. § 9-463.02(A).

² Numerous exemptions exist, however, which are not addressed in this article. These include exemptions for lots or parcels of one hundred sixty acres or more, and for bulk sales of six or more lots to a single buyer in a single transaction. See A.R.S. § 32-2181.02(A)(1-2). Also, lands zoned and restricted to commercial or industrial use are exempt from the public report requirements of the subdivision statutes. See A.R.S. § 32-2181.02(B)(1).

³ A.R.S. §§ 32-2181 & -2183.

⁴ A.R.S. § 11-806.01; see A.R.S. § 32-2181(A)(6).

⁵ Other requirements include obtaining a statement of water adequacy, or where the land is situated within a groundwater active management area, a certificate of assured water supply, from the Department of Water Resources. See A.R.S. §§ 45-108(A), (H); 32-2181(C).

⁶ See Laws 1997, Ch. 172, §1.

⁷ Dedication requires intent to dedicate to a public use and acceptance by the county or applicable entity for maintenance. State ex rel. *Herman v. Cardon*, 112 Ariz. 548,

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Barriers

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550, 544 P.2d 657, 659 (1976); *City of Scottsdale v. Mocho*, 8 Ariz. App. 146, 444 P.2d 437 (1968).

⁸ Public highways can be established by the state, A.R.S. § 28-6901 et seq., by counties, A.R.S. § 28-6907 et seq., by incorporated cities, A.R.S. § 9-276, and incorporated towns, A.R.S. § 9-240 et seq.

⁹ Normally, under Commissioner's Rule R4-28-B1205, "except for lots in a platted subdivision, if 2 or more contiguous parcels of land are acquired by a single owner, the Department shall classify the lots as a single parcel for purposes of subdivision laws." A.A.C. R4-28-B1205 (1999).

¹⁰ At the time of the sales at issue in *Siler*, a subdivision consisted of four or more lots. *Siler*, 193 Ariz. at 380, 972 P.2d at 1016.

¹¹ In support of this theory, see *Williams v. Fox*, 198 Cal.Rptr. 558, 560 (App. 1984) ("four-by-fouring" is not permitted under California subdivision statutes, from which the Arizona subdivision statutes are derived).

¹² This third example provides a particularly interesting case, in the author's opinion, for a claim of acting in concert through a common promotional scheme to subdivide land. While the Arizona Department of Real Estate has brought subdivision enforcement actions in these types of cases, there are no reported Arizona court decisions addressing this issue.

¹³ The definition of "subdivision" under ILSFDA is different than that under the Arizona Act, and is subject to numerous exemptions not discussed herein.

¹⁴ These factors are not presumptive, however, and the presence of one or more of the characteristics may or may not denote a common promotional plan under ILSFDA. See 61 Fed. Reg. 13596, 13602.

Michael Denious is an Assistant Attorney General with the Arizona Attorney General's Office, and represents the Arizona Department of Real Estate, as well as the Arizona Department of Insurance and the Arizona State Banking Department. The views expressed herein are solely those of the author and should not be attributed to the Attorney General's Office or any other state agencies or political subdivisions.

Legislation requires new Public Report disclosure

New legislation, Senate Bill 1525, requires a question to be added to the airport section of the Subdivision Application for Public Report.

A.R.S. § 32-2181(A)(23) has been amended to read:

"23. A true statement as to whether all or any portion of the subdivision is located in territory in the vicinity of a military airport as defined in section 28-8461, in territory in the vicinity of a public airport as defined in section 28-8486 or, on or after July 1, 2001, in a high noise or accident potential zone as defined in section 28-8461."

The statement required pursuant to this paragraph does not require the amendment or refile of any notice filed before July 1, 2001.

Effective July 1, 2001, the airport questions in No. 6(c) of the applica-

tion will include a new question asking if the subdivision is located in a high noise or accident potential zone as defined in section 28-8461.

This modification will also be made to the Department's Unsubdivided Land application. If you file an application after July 1, 2001, and the application did not ask the new question, you will be asked to answer the question during the processing of your application.

Senate Bill 1525 further requires public reports, conditional sales contracts and lot reservations to include enhanced disclosures relating to military airports and their proximity to subdivisions.

Special disclosure language is to be placed on the first page of the public report and a map showing the location of the military airport is to be

included with the public report.

These enhanced disclosures, however, are subject to the military airport(s) providing the Department with all required information, including maps.

Upon receipt of all the information from the military airports, The Department will provide you further notice of how the Department will administer and enforce these requirements. Until then, no changes regarding these additional disclosures are necessary.

Revised applications for a Subdivision Public Report and a Subdivision Public Report for Unsubdivided Land are available in Adobe Acrobat and Microsoft Word format from our web site. Go to www.re.state.az.us/library.html.

Licensee's failure to verify information was costly

In the June issue of the Arizona Real Estate Bulletin, the Department published the text of the revised version of Substantive Policy Statement No. 2 titled "Agency Responsibility."

The Statement reads, in part, "An agent has a fiduciary to his or her client to act in the client's best interests. This duty includes an obligation to exercise reasonable care in obtaining and communicating information that is material to the client's interests and relevant to the contemplated transaction.

"...An agent may be expected to take reasonable steps to assist a client

in confirming or verifying information under circumstances in which a reasonably prudent agent has reason to question the accuracy of the information, or where the client has questioned the accuracy of the information."

An example of an agent who failed to "take reasonable steps" may be found in the Consent Order, 00A-130, of Jean M. Jajou, which appears beginning on page 8 of this issue.

Jajou, who represented the buyer, relied on MLS information and on the representations of the seller's agent about the year of manufacture of a mo-

bile home. The home was represented by MLS data and by the seller's agent to have been manufactured in 1992. Actually, it was a 1972 model. The seller's agent said he obtained the year of manufacture from the seller, who is a real estate broker.

The buyers were required to purchase hazard insurance on the mobile home. The insurer said he could only insure 1978 or newer models, and asked Jajou to verify the year, model and serial number of the mobile home. Again she relied on representations by the

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Administrative actions

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keep it in service through the life of the loan.

Escrow was opened, and the buyers contacted American Family Insurance to obtain the insurance policy required by the seller. At the buyers request, Jajou spoke with American Family who explained that they could only insure 1978 or newer models. Jajou was asked her to verify the year, model and serial number of the mobile home. Jajou and an insurance company representative spoke with Mogo who verified the year (1992) and the serial number. Mogo told American Family that he obtained the information from Rogers.

Rogers, Mogo and Gorney had access to information that the mobile home was a 1972 model but allegedly failed to convey this information to Jajou or the buyers.

Escrow closed on October 8, 1999. The Preliminary title report referenced the docket and page where the affidavit of affixture (executed when the mobile home was first installed) was recorded.

About two months after closing, the buyers investigated the purchase of a new heat pump for the home. They discovered that the existing heat pump and mobile home were much older than Rogers, Mogo and Gorney had represented them to be. Jajou obtained the actual recorded affidavit of affixture which disclosed the 1972 date of manufacture.

VIOLATIONS: Jajou's failure to ascertain the actual model year of the mobile home constitutes negligence within the meaning of A.A.C. R4-28-1101(C), and a violation of A.R.S. § 32-2153(A)(22). Her failure to expeditiously perform all acts required by the holding of a license, pursuant to A.A.C. R4-28-1101(C), constitutes a violation of A.R.S. § 32-2153(A)(3).

DISPOSITION: Jajou to pay a civil penalty in the amount of \$1,000 and to attend nine hours of continuing education classes in the categories of Commissioner's Standards, Contract Law and Real Estate Legal Issues.

01A-018

**Troy E. Somers
Lake Havasu City**

DATE OF ORDER: July 18, 2001

FINDINGS OF FACT: In his August 2, 1999 application for a real estate salesperson's license, Respondent failed to disclose a 1987 conviction in Mohave County for possession of dangerous drugs, an undesignated/class 4 felony, and an 1987 conviction in Las Vegas for DWI.

VIOLATIONS: Respondent's failure to disclose the convictions constitutes procuring or attempting to procure a license by filing a license application that was false or misleading, within the meaning of A.R.S. § 32-2153(B)(1). His conduct does not show he is a person of honesty, truthfulness or good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: Respondent's real estate license shall be suspended for 90 days upon entry of this Order. Respondent to pay a civil penalty in the amount of \$1,000 and attend six hours of approved continuing education classes, in addition to hours required for license renewal, in the categories of Commissioner's Standards and Real

Worm infecting real estate community computers

An Internet worm, dubbed "SirCam," is spreading rapidly throughout the real estate community.

An infected computer will send the worm, a form of virus, to addresses in the computer's email address book, often attaching a file from the computer's Documents folder.

Eventually, the worm will fill the infected hard disk with text or erase the contents of the hard drive.

The apparent sender of the email may be someone you know because their computer has become infected and is sending the worm to you without their knowledge. The text of the email is:

Hi! How are you?

I send you this file in order to have your advice.

See you later. Thanks

The attachment always has a double suffix, for instance xxxxxxx.doc.pif. DO NOT OPEN THE ATTACHMENT. DELETE IT IMMEDIATELY.

The Wired News web page describes what happens if you open the attachment:

Besides e-mailing a randomly selected document from the "My Documents" folder to every e-mail address stored on an infected computer's system folder, SirCam also plays an odd little game of chance with an infected computer.

When activated, the virus randomly chooses whether to take over all the unused space on a hard drive by filling it with text, or it may delete the contents of the hard drive.

SirCam worms its way deeply into an infected computer's operating system and also changes its identity with each and every infected e-mail it sends.

When a computer is infected with SirCam, the worm copies itself to "c:\recycled\SirC32.exe" and as "SCam32.exe" in the Windows system directory.

The "SirC32.exe" file is then registered as default startup command for executable (.exe) files so it will run whenever any .exe

Suspension

Continued from page 1

structor refused to issue Amato a continuing certificate. According to the instructor, Amato argued that he should receive a certificate because he had "put in the time" and "had earned it."

The Licensing Division accepted the renewal application on the basis of Amato's signed declaration. When the Department received a complaint from the instructor, an investigation revealed that Amato could not produce a continuing education certificate for the course.

Amato has 30 days from July 18, the date of the order, to request a hearing before an Administrative Law Judge to contest the allegations.

Real Estate Commissioner Jerry Holt said the incident should serve as a heads-up to anyone who believes a licensee can attend a continuing course, pay no attention to the instructor, then expect credit for the course. "We absolutely support the instructor's decision to not issue the certificate," the Commissioner said.

file is run. The "SCam32.exe" file is registered as a driver that makes sure it will be started when the system boots up, according to Symantec's analysis.

The worm then creates a list of e-mail addresses from the Windows Address Book and Temporary Internet Files, and creates a file called "scw1.dll" in the system directory.

SirCam then scans the hard drive of the infected computer, and all drives that the infected machine has access to.

From the contents of the "My Documents" folder the worm makes a list of files with specific extensions including .doc, .zip and .jpg, selects a random file from the list, and attaches it to an e-mail along with a copy of the virus.

How do you detect and eliminate the worm? You can purchase VirusScan 5.21 from McAfee (www.mcafee.com) for \$29.95 or Norton Anti Virus from Symantec (www.symantec.com) for \$59.95. These utilities will detect and eradicate a virus attached to an incoming email and scan your hard drive for the presence of a virus and eradicate it. Both of these virus utilities automatically update themselves via the Internet.

Costly failure

Continued from page 12
seller's agent.

The buyers discovered the true age of the mobile home when they attempted to purchase a new heat pump for the home.

In the consent order, Jajou stipulated that her failure to ascertain the actual model year of the mobile home constituted negligence within the meaning of Commissioner's Rule R4-28-1101(C), and that she failed to expeditiously perform all acts required by the holding of a license pursuant to R4-28-1101(C). She was assessed a civil penalty in the amount of \$1,000 and required to attend nine hours of continuing education in addition to hours required for license renewal.

What could Jajou have done to determine the true age of the home? The easiest thing would have been to visit the mobile home and look at the manufacturer's nameplate which would have shown the serial number and date of manufacture. She also failed, before escrow closed, to check the affidavit of affixture which was executed when the mobile home was installed in the mobile home park. She did obtain a copy when the buyers attempted to purchase the heat pump and were told by the heat pump manufacturer that the home was far older than they thought.

Unquestioning reliance on information provided by others is a bad idea, as this case demonstrates. A little extra effort to verify the information would have avoided a very messy situation.

ADRE terminates Fax Response Service

The Department has terminated its Fax Response Service. Using the service, callers to the Department's Phoenix office could have the Arizona Real Estate Bulletin, forms and other documents sent to their fax machine.

The decision was made after a thorough review of customer usage of the service. Requests for faxed documents have declined dramatically because of the availability of the documents through the Department's web site. In some weeks, as few as five requests for faxed documents have been received by the system.

Those who do not have access to the internet may call our Customer Service Division at 602-468-1414 X100 and ask that documents, other than the *Arizona Real Estate Bulletin*, be faxed to them.

To obtain a subscription to the Bulletin via mail, send a check for \$10 to
Bulletin
ADRE
2910 N 44th St.
Phoenix AZ 85018-7256.

When does my license expire?

If you have Internet access, point your browser to the Department's web site, www.re.state.az.us and click on "Directory of Licensees."

The directory shows the license expiration date of all active and inactive

licensees plus the employing broker, if the licensee is active. Other information includes all employees of the employing broker, branch office locations and employees, business telephone numbers and addresses.

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